

FILED  
COURT OF APPEALS  
DIVISION II

2017 MAR 24 AM 11:30

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

AP  
DEPUTY

STATE OF WASHINGTON, )

)

Respondent, ) NO. 49183-4-II

)

v. )

MICHAEL JOSEPH BRADY, )

)

Appellant. )

} APPELLANT'S STATEMENT  
OF ADDITIONAL GROUNDS  
FOR REVIEW

A/M 3/21/17

A. IDENTITY OF APPELLANT

COMES NOW, Michael Joseph Brady, Appellant Pro Se,  
Pursuant to RAP 10.10, having received and reviewed  
the opening brief prepared by my attorney file this  
STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW.

B. STATEMENT OF THE CASE

There is no dispute that Appellant perpetrated  
heinous crimes against his victims and because of  
Appellant's Statement of Additional Grounds - I

Appellant's heinous acts, the victims are going to go through their lifetimes having to deal with the physical and emotional trauma that the Appellant caused.

AT the resentencing hearing in 2006, Appellant asked his attorney, Gary Clower, WSB# 13720 if there was an "Appendix H" in addition to the "Appendix F" that was included in the new 2006 judgment and sentence. Appellant's attorney told him that there was no "Appendix H" to the 2006 judgment and sentence.

On December 30<sup>th</sup>, 2010, the trial court issued an ORDER CORRECTING JUDGMENT AND SENTENCE DATED MARCH 24, 2006 vacating all the sexual exploitation of a minor convictions and deleting the special verdict finding of sexual motivation.

As part of the trial court's order it noted in #16 All other conditions of the judgment and sentence dated

March 24, 2006 remain in effect. This order was signed

Appellant's Statement of Additional Grounds-2

by the trial court, the State, and Appellant's attorney.

The State did not ask the trial court to correct or

reconsider any Community Custody Conditions it imposed as

part of the new judgment and sentence entered on

March 24, 2006, which only had "Appendix F" attached to

it listing the community custody conditions Appellant has

to follow upon Appellant's release. See Exhibit A.

After resentencing in 2006 until Appellant was classified

by the Department of Corrections in 2015, the Department of

Corrections (DOC) has used the conditions listed in "Appendix F"

to notify Appellant that these would be the conditions

that Appellant would have to follow while on community custody.

However, in 2015 the DOC reverted back to the community

Custody conditions from Appellant's 2002 judgment and sentence

listed in "Appendix H" because the Records Department at

Airway Heights Correctional Center contacted Deputy Prosecuting

Appellant's Statement of Additional Grounds-3

Attorney (DPA), Sven Nelson, instead of the trial court, and Mr. Nelson stated, "that the community custody conditions from "Appendix H" in the 2002 judgment and sentence remain in effect."

Once Appellant saw these new conditions he motioned the trial court for clarification of sentence and/or modification of community custody conditions.

This appeal follows.

### C. ARGUMENT

The State first claims that sex offenders "often pose a high risk of re-offense[.]" See Brief of Respondent at page 8.

Regarding the State's assertion that sex offenders pose a high risk to re-offend. State v. Heiskell, 129 Wn.2d 113, 117, 916 P.2d 366, 368 (1996), what is the State's scientific or statistical basis for this belief?

A 2014 Justice Department report has found that sex offenders have a low recidivism rate for all crimes. That same report found that in the three years after release from prison only 5.3% of sex offenders were arrested for new sex offenses. Although, this rate climbs to 27% over twenty years, that still means that the majority of sex offenders released from prison do not re offend.

New York Times, Vol. CLXVI, No. 57,529 (March 7, 2017),

"NOT A LOT OF EVIDENCE BEHIND A SUPREME COURT

RULING ON SEX OFFENDERS" by Adam Liptak.

This article goes into detail that the basis for much of American Jurisprudence and Legislation about sex offenders was rooted in an offhand and unsupported statement in the mass market magazine, Psychology Today. In a 1986 article titled "Changing a lifetime of sexual crime; can a Sexual offender ever alter theirways?" by Appellant's Statement of Additional Grounds - 5

Robert Freeman-Longo, fn.<sup>1</sup> talked about a counseling program, run by the authors, and they made a statement that could be good for business. "Most untreated sex offenders released from prison go on to commit more offenses — indeed, as many as 80 percent do," the article said without evidence or elaboration.

Psychology Today, Vol. 20 (March 1986), "Changing a Lifetime of Sexual Crime: Can a sexual offender ever alter their ways?"

by Robert Freeman-Longo.

The State might claim that the statement is correct because it says, "that most untreated sex offenders released from prison go on to commit more offenses." Emphasis added.

However, this Court and the State should look at the report written by the Washington Institute of Public Policy titled, "Preliminary Recidivism Rates, Twin Rivers Sex Offender Treatment Program."

fn.1 This Court has to use the hyphenated name of author to find the article, otherwise, this Court will find articles about a famous artist.

Report ID# 94-06-102 dated June 1994, which shows that offenders who take the treatment program have a slightly higher recidivism rate than those who do not.

The State might claim that the number 80 percent is the majority of sex offenders.

However, based on all the statistical data, the actual rate of recidivism for the majority of sex offenders is between 3.5% to 5.0%. Going to prison is enough of a deterrent.

#### ADDITIONAL GROUND #1

What did this Court mean when it wrote:

Accordingly, it is hereby [ ] Ordered that this petition is granted, Petitioner's Sentence is Vacated, and this case is remanded for resentencing?

The State claims that the words used by higher courts to communicate their decisions similarly derive meaning from context. By binding meaning to context, courts safeguard against words selected to achieve a considered purpose.

being misapplied to destabilize an aspect of a decision or the law that was not before the court. See Brief of Respondent at page 16.

Furthermore, the State claims that in the limited context, the word "sentence" was safely used as a synonym for prison time, so the remand order did not supersede the 2002 sentence beyond the exceptional prison term reviewed.

See Brief of Respondent at 17-18.

Subsequently, what the State is claiming is that this Court meant by its order "is that the personal restraint petition is granted and this matter is remanded to the trial Court for vacation of the exceptional sentence; Petitioner need not be resentenced."

However, this is not what this Court wrote. This was not what the trial court interpreted this Courts order meant. The trial court held a full adversarial sentencing hearing.

This meant that the entire sentencing proceeding from 2002 was expunged from the record. This includes the order by the trial court that the DOC perform a risk assessment and presentence investigation and report back to the trial court with Doc's findings and recommendations to include what community custody conditions that Doc felt appropriate to monitor Appellant upon his release to community custody. CrR 7.1

As part of the new sentencing hearing, the State asked the trial court to order L.F.O.'s, no contact orders, HIV testing, and community custody. The State specifically wrote on the new 2006 judgment and sentence, "Orders prohibiting contact with victims entered on 11/22/02 remain in effect." The State also submitted "Appendix F" with the new conditions of community custody. The trial court, the State, and Appellant's trial attorney all signed the new judgment and sentence on March 24, 2006 and it was filed in open court on the same day.

Why would the State ask the trial court to order these things, if the State actually believed that the remand order from this Court only dealt with Appellant's exceptional sentence?

Why did the State hand write, "Orders prohibiting contact with victims entered on 11/22/02 remain in effect" if the State actually believed that the remand order from this Court only dealt with Appellant's exceptional sentence?

The answer to these questions is that the State did not believe that the remand order from this Court only dealt with Appellant's exceptional sentence.

If this Court agrees with Appellant that the trial court erred in ruling that the community custody conditions imposed as part of the 2002 judgment and sentence remain in effect, the State would not be prejudiced in any way. The State through DOC can petition the trial court at any time to add conditions to Appellant, which would allow Appellant the

Due Process protections of the United States Constitution and the Washington State Constitution, by having a hearing where both parties can argue before the court on whether the new condition(s) are valid and necessary. RCW 9.94A.715; RCW 9.94A.720.

#### ADDITIONAL GROUND #2

The State claims that treatment-based plethysmographs may someday provide the only warning defendant is poised to reoffend, quoting Heiskell, 129 Wn.2d at 117; Castro, 141 Wn.App. at 494. See Brief of Respondent at page 20. Emphasis Added.

What is the State's scientific or statistical basis for this belief?

Appellant is unaware of any methodologically sound study of the plethysmograph having been submitted to a reputable peer-reviewed journal or endorsed by any of the National professional associations that would have interest in the subject. Indeed, it seems that enthusiasm for this test, with its dubious origin,

comes principally from those who are paid to administer it.

The efficacy of the plethysmograph is not being championed

by the psychology and psychiatry departments of universities

but by profiteers and their allies in the State. The

plethysmograph does no more to protect society than "conversion

therapy" does to undo homosexual orientation. It is the junk science

of the mid-20<sup>th</sup> century that should be struck from the books of

law.

This Court states in State v. Johnson, 184 Wn. App 777, 781, fn. 3,  
340 P.3d 230 (2014), "[P]lethysmograph testing attempts to  
measure sexual arousal with a [ ] device attached to the penis  
while subject is shown images of [ ] sexual activity." Emphasis Added.

The wording from this Courts opinion shows doubt that Plethysmographs  
can actually show warning that anyone is poised to offend  
sexually by using the word "Attempts" in its decision. In  
determining if plethysmographs could be used as a treatment tool,  
Appellant's Statement of Additional Grounds-12

this Court relied on testimony from sexual treatment counselors to justify allowing plethysmographs to be used as a treatment tool, just like the article in the March 1986 magazine Psychology Today, where the sexual treatment counselors are making a statement that could be good for business without evidence or elaboration.

This Court should ask and view any evidence from a reputable peer reviewed journal or any studies by the psychology and/or psychiatry departments of universities before accepting plethysmographs as a legitimate tool of State sanctioned therapy.

#### Ripe for Review

The State claims that "defendant's pre-enforcement challenge to plethysmograph testing will not be ripe unless DOC someday tries to order it for monitoring instead of court-ordered treatment."

See Brief of Respondent at page 14.

Appellant's Statement of Additional Grounds-13

Furthermore, the State claims, "if one assumed the pornography condition is facially invalid, and it had not been raised in a mixed petition with a time-barred claim, it is not clear a pre-enforcement challenge could prevail in a PRP where relief requires proof of actual and substantial prejudice."

See Brief of Respondent at pages 14-15.

The Washington Supreme Court states that a claim is also ripe for review where "(1) ... the issues raised are primarily legal, (2) do not require factual development, and (3) and the challenged action is final. State v. Bahi, 164 Wn.2d 739, 751, 193 P.3d 678 (2008)

In State v. Sanchez Valencia, 169 Wn.2d 782, 795-787-790, 239 P.3d 1059 (2010) reiterating in the context of community custody conditions that "a criminal defendant always has standing to challenge his or her sentence on grounds of illegality." The Court also found "that it would be a significant hardship to a defendant who had to wait to be violated for a community

custody condition to challenge its legitimacy, and this weighs in favor of pre-enforcement challenge."

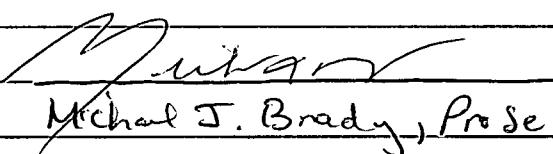
All of the community custody conditions Appellant is challenging are ripe for review.

#### D. CONCLUSION

For the reasons set forth above, Appellant asks this Court to reverse the trial courts ruling on Appellant's motion and notify Doc that the 2006 community custody conditions listed in "Appendix F" apply to Appellant.

In the alternative, reverse the trial courts ruling on Appellant's motion and remand back to the trial court for modification of the 2002 community custody conditions listed in "Appendix H."

Respectfully submitted this 20<sup>th</sup> day of March, 2017,

  
Michael J. Brady, Pro se

# **EXHIBIT**

A

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

CAUSE NO. 01-1-06116-1

vs.

Plaintiff,

MICHAEL JOSEPH BRADY,

ORDER CORRECTING JUDGMENT  
AND SENTENCE DATED MARCH 24,  
2006

Defendant.

THIS MATTER having come on for hearing before the undersigned judge of the above entitled court following directive from the Washington State Supreme Court,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

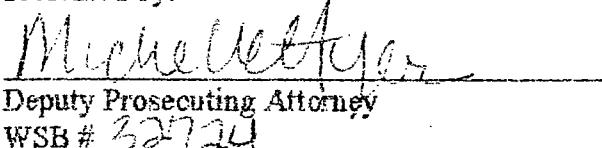
- (1) Count XX in paragraph 2.1 of the judgment and sentence is hereby vacated.
- (2) Count XXI in paragraph 2.1 of the judgment and sentence is hereby vacated.
- (3) Count XXIII in paragraph 2.1 of the judgment and sentence is hereby vacated.
- (4) Count XXV in paragraph 2.1 of the judgment and sentence is hereby vacated.
- (5) Count XXVIII in paragraph 2.1 of the judgment and sentence is hereby vacated.
- (6) Count XXXI in paragraph 2.1 of the judgment and sentence is hereby vacated.
- (7) The sentence in paragraph 2.1 of the judgment and sentence that reads as follows "A special verdict/finding of sexual motivation was returned on Count(s) 20, 21, 23, 25, 28, 31 RCW 9.94A.835" is deleted.
- (8) Count XX in paragraph 2.3 of the judgment and sentence is hereby vacated.

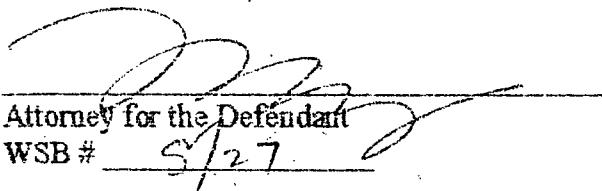
- (9) Count XXI in paragraph 2.3 of the judgment and sentence is hereby vacated.
- (10) Count XXIII in paragraph 2.3 of the judgment and sentence is hereby vacated.
- (11) Count XXV in paragraph 2.3 of the judgment and sentence is hereby vacated.
- (12) Count XXVIII in paragraph 2.3 of the judgment and sentence is hereby vacated.
- (13) Count XXXI in paragraph 2.3 of the judgment and sentence is hereby vacated.
- (14) The defendant's offender score listed in paragraph 2.3 for all remaining counts is changed from 87 to 69.
- (15) Counts 20, 21, 23, 25, 28 and 31 are omitted from paragraph 4.12.
- (16) All other conditions of the judgment and sentence remain in effect.

DONE IN OPEN COURT this 30<sup>th</sup> day of December, 2010.

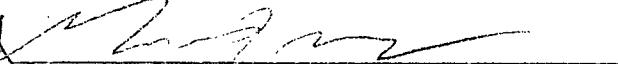
  
JUDGE

Presented by:

  
Michelle Ueffing  
Deputy Prosecuting Attorney  
WSB # 32724

  
Attorney for the Defendant

WSB # 5127

  
Defendant

DECLARATION OF MAILING

I, Michael Joseph Brady, declare that, on the 20<sup>th</sup> day of March, 2017, I placed the foregoing APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW thereto, related with all exhibits, or copy thereof, in the internal legal mail system of the Airway Heights Corrections Center, with appropriate postage, addressed to:

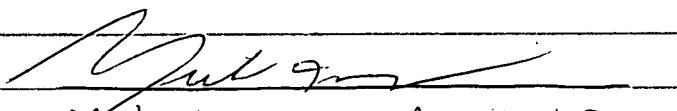
Derek M. Byrne, Court Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA. 98402-4454

Jason Ruyf, DPA  
Prosecuting Attorney's Office  
930 Tacoma Avenue South  
Tacoma, WA. 98402

Catherine E. Glinski  
Glinski Law Firm PLLC  
P.O. Box 761  
Manchester, WA. 98353

I swear in accordance with the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED this 20 day of March, 2017.

  
Michael J. Brady - Appellant Pro Se  
Airway Heights Correctional Center  
P.O. Box 2049 - 847662  
Airway Heights, WA. 99001-2049